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How Far Possession Overrides Intention in Sales of Goods

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How Far Possession Overrides Intention in Sales of Goods

I. RETENTION OF POSSESSION AS FRAUD ON CREDITORS.

1. Effect of Fraudulent Conveyances—Preferences.

The common law position respecting fraudulent conveyances has been, at least since the statute of 13 Eliz. c. 5 (1570),[1] that transfers of property with intent to hinder, delay, or defraud creditors were regarded as operative between the parties thereto, but that they could be treated as void by the transferor's creditors unless the goods were transferred to purchasers for value without notice. The legal effect of such fraudulent transfers was therefore to vest the property interest in the goods in the transferee,[2] subject to a power in the fraudulent transferor's creditors to subject the goods to their claims, as for instance by levying attachment or execution, as if no transfer had been made,[3] which power could not be exercised, however, against purchasers of the goods for value without notice.[4]

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[1]The material provisions are conveniently reprinted in Williston's Cases on Bankruptcy, (1906) at pp. 161-162. For reference to the present state of the American authorities see footnotes 9 and 10 below with accompanying text. At p. 162 of Williston's Cases on Bankruptcy the compiler cites numerous authorities for the position that such conveyances as were within this statute would be invalid without the aid of the statute.

[2]Moore v. Schneider, 196 Cal. 380, 238 Pac. 81 (1925) (assignment for benefit of consenting creditors); Zimmerman v. Garfinkel, 144 Md. 394, 124 Atl. 919 (1924) (bulk sale of stock of merchandise); Cames v. Sawyer, 248 Mass. 368, 143 N. E. 326 (1924) (corporate stock).

[3]Convenient examples of the process are Vance v. Bell, 153 Ark. 229, 240 S. W. 8 (1922); Tilson v. Terwilliger, 56 N. Y. 273 (1874) (horse); Stimson v. Wrigley, 86 N. Y. 332 (1881).

[4]Sec. VI of the statute of 13 Eliz. c. 5, contains the following: "provided . . . that this act . . . shall not extend to any . . . goods . . . which . . . shall be upon good consideration and **bona fide** lawfully conveyed . . . to any person . . . not having at the time of such conveyance . . . and manner of notice or knowledge of such . . . . fraud . . ."

To this extent, therefore, the law applicable to fraudulent conveyances sacrificed the security of acquisitions by later parties in order to promote greater security of contracts between the original seller and his creditors. It was not thought worth while for this end to sacrifice security of acquisitions of subsequent purchasers for value without notice. The substance of this common law position was embodied in the English statute of 13 Eliz. c. 5, and has been re-enacted in some form in most of the states in this country.[4] At common law a transfer by the debtor to one of his creditors in satisfaction of a pre-existing debt is not regarded as fraudulent merely because it results in a preference of one creditor over another.[5] A preference is included, however, among the acts of bankruptcy enumerated in the Federal Bankruptcy Act.[6]

2. Retention of Possession Presumptively Fraudulent.

It was held in an early leading case[7] that where a seller makes a sale of goods to a buyer, but nevertheless continues in possession as before, such retention of possession is evidential that the sale was intended to defraud creditors. The basis for this inference is that where by arrangement with the buyer the seller after the sale continues to enjoy the benefits of possession as he did before there is a likelihood that the transaction was not intended by the parties to be genuine, but was intended only as a colorable scheme to help the seller to keep the goods from being

[5]Huntley v. Kingman & Co., 152 U. S. 527, 38 L. ed. 540 (1894); Merillat v. Hensey, 221 U. S. 333, 55 L. ed. 758, 31 S. C. 575, 36 L. R. A. (N.S.) 370 (1911); Rodgers v. Boise Ass'n of Credit Men, 33 Idaho 513, 196 Pac. 213, 23 A. L. R. 195 (1921) (general assignment to trustee for benefit of creditors); Farmers' Loan and Trust Co., v. Scheetz, 196 Iowa 692, 195 N. W. 348 (1923) (farm and live stock); Harnan v. Haight, 209 Mich. 604, 177 N. W. 281 (1920) (conveyance of debtor's assets to a family corporation in exchange for its stock, and use of that stock to pay debts due relatives); Merchants' Bank v. Page, 147 Md. 607, 128 Atl. 272 (1925) (real estate); Cutter v. Pollock, 4 N. D. 205. 59 N. W. 1062 (1894); Smith v. Keener, 270 Pa. 578, 113 Atl. 912 (1921) (assignment of judgment).

[6]Federal Bankruptcy Act, sec. 3, subdivisions 2 and 3.

[7] Twyne's Case, 3 Coke, 80 b. (1601).

taken by his creditors.[8] Certain jurisdictions at times have gone so far as to hold that retention by the seller is conclusive of fraud against creditors.[9] The great weight of authority now, however, is that such retention of possession at most gives rise to a presumption of fraud which may be rebutted by affirmative proof of good faith in the transaction.[10]

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[8]". . . the not having taken possession was evidence that the thing was a sham . . ." Lord Blackburn, in Cookson v. Swire, 9 Appeal Cases, 653 (1884). In Splain v. B. F. Goodrich Rubber Co., 290 F. 275 (1928) it was stated that failure to deliver possession of automobile tires was a fact to be considered by the jury in determining whether or not the sale was fraudulent.

[9]A dictum in Edwards v. Harben, 2 Term. Rep. 587 (1788) is the leading source for this position. Though later overruled in England it has had considerable following in this country. In Williston on Sales, chapter XV, is presented an elaborate examination of the legal materials on the point for each state, showing this position in substance to prevail in Colorado, the District of Columbia, Idaho, Illinois, Missouri, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Utah, and Vermont. The same position is there shown to be taken, unless a bill of sale evidencing the transaction is recorded, in Iowa, Kentucky, Maryland, and Washington. For recent illustrative cases see: Freedman v. Avery, 89 Conn. 439, 94 Atl. 969 (1915) (lumber); Smith v. Knemodler, 204 Ill. App. 606 (1917); Sterling Commercial Co. v. Smith, 291 Pa. St. 236, 139 Atl. 847 (1927) (automobiles); Wendel v. Smith, 291 Pa. St. 247, 139 Atl. 873 (1927) (automobiles); C. Trevor Dunham, Inc., v. Van Orsdale, 82 Pa. Super. Ct. 72 (1923) (machinery); Barnett v. Cain, 88 Pa. Super. Ct. 106 (1926); Horton v. Colonial Finance Corp., 90 Pa. Super. Ct. 460 (1927) (automobiles); Foss v. Towne, 98 Vt. 321, 127 Atl. 294 (1925) (automobile).

[10]A leading English case on the point is Martindale v. Booth, 3 Barn. & Ad. 498 (1832).

In Williston on Sales, chapter XV, is presented an elaborate examination of the legal materials on the point for each state, showing this position in substance to prevail in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

Among recent illustrative cases are the following: Sherry v. Janov, 137 N. Y. S. 792 (1912) (restaurant—dictum); Kimball v. Cash, 176 N. Y. S. 541 (1919) (automobiles). In Salem Trust Co. v. Mfrs.

In the United States there is from state to state considerable variation in the statutory and judicial materials bearing upon what is in this connection to be considered as demonstrating the presence of fraud. The Uniform Sales Act, accordingly, does not attempt to define fraud, but provides that where a person having sold goods continues in possession of the goods sold, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.[11] It is indispensable in dealing with actual controversies of this kind to examine very carefully the legal materials on the subject afforded by the state whose local law is in question.[12] No attempt can be made in the present work to discuss the numerous problems of application in detail.

3. Proof of Good Faith—or Change of Possession.

Highly controversial questions may readily be involved over the presence in fact of good faith in the transaction.[13] If the independent evidence of good faith is not sufficiently definite or convincing to be solely depended on for sustaining the transaction, or if in the local jurisdiction retention

Finance Co., 264 U. S., 182, 68 L. ed. 628, 44 S. C. 519 (1924), and in In re Leterman, Becher & Co., 260 Fed. 543 (1919), the same rule is applied to assignments of choses in action where the assignor remains in control, as it were, for lack of notice to the debtor by the assignee.

[11]Uniform Sales Act, sec. 26.

[12]Williston on Sales, chapter XV presents a valuable compilation of the legal materials on the point for each state.

[13]In Teague v. Bass, 131 Ala. 422, 31 So. 4 (1901) a merchant sold his entire stock, consisting principally of new goods just received, to a clerk in his employ, but retained possession of the store and went on selling the goods in the ordinary course of business as usual. One of the merchant's creditors later attached the goods. In the action that followed it was held that the evidence adduced did not satisfactorily account for the seller's continuing in possession. In Meade v. Smith, 16 Conn. 346 (1844) the owner of certain cows, oxen, etc., elsewhere located one morning gave plaintiff a bill of sale covering those goods. Plaintiff immediately set out for the place where

of possession is regarded as conclusive of fraud,[14] the alternative controversial fact inquiry must be met as to whether enough was done to constitute the required change of possession.[15] Enough to show a change of possession may at times appear without a manual delivery of the goods, espec-

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the goods were located, but did not arrive until they had been seized by a later attaching creditor of the original owner. It was held that the presumption of fraud arising from the lack of delivery was repelled by the fact that it was not practicable for the vendee to take possession immediately but that he did so within a reasonable time.

In Ingalls v. Herrick, 108 Mass. 351, 11 Am. Rep. 360 (1871) it was held that the buyer's taking samples from bales of wool, to be used in reselling, was a significant act of ownership overcoming the presumption of fraud from the seller's retention of possession. The court also speaks of it as evidence of delivery.

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[14]See footnote 9 above, for list of jurisdictions so holding.

[15]In Edwards v. Wilkins, 242 S. W. 995 (Mo. App.) (1922), it was held that in sale of wheat shocked in a field a reasonable time for delivery must elapse before the transaction could be considered void as to execution creditors of the seller.

Under the rule as applied in New York, requiring a "continued change of possession," it was held in Tilson v. Terwilliger, 56 N. Y. 273 (1874) that a redelivery to the seller after the lapse of about two years gave rise to the presumption of fraud, and imposed upon the buyer the burden of giving affirmative proof of good faith. It was stated in Stevens v. Irwin, 15 Cal. 503, 506, 76 Am. Dec. 500 (1860), however, in dealing with the application of the rule requiring continued change of possession that "it need not necessarily continue indefinitely when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee." To the same effect see remarks of Holloway, J. in Puckett v. Hopkins, 63 Mont. 137, 206 Pac. 422 (1922). In Stimson v. Wrigley, 86 N. Y. 332 (1881) it was held that a later delivery from the seller to the buyer, not substantially contemporaneous with the sale, did not overcome the presumption of fraud, but rather strengthened it. A contrary view on this point was taken in Weeks. v. Fowler, 71 N. H. 518, 53 Atl. 543 (1902) wherein it was stated that the later delivery terminated the secret trust, and purged the sale of its fraudulent character. For further authorities on the point, see 28 L. R. A. (N. S.) 214. In the case of In re Irwin, 268 Fed. 162 (1920) an arrangement was entered into between a retail dealer in automobiles and a financing company whereby the dealer as security for advances sold the cars in his

ially in connection with dealings covering bulky, heavy, or distant goods, by proof of facts manifesting such open and notorious change of control as is reasonably possible under the circumstances.[16]

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possession to the financing company, and took from it a lease of the cars calling for payment of "rent" to the amount advanced, the dealer agreeing to keep the cars in storage in his showroom. It was held that the financing company's claim to ownership of the cars could not be allowed against the dealer's trustee in bankruptcy, there having been no actual or symbolical delivery of possession. To the same general effect is Sterling Commercial Co. v. Smith, 291 Pa. 236, 139 Atl. 847 (1927). For authorities on the necessity of change of possession to uphold a judicial sale as against creditors of the former owner, see annotation in 36 L.R.A. (N. S.) 1018.

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[16]In Weeks v. Fowler, 71 N. H. 518, 53 Atl., 543 (1902) it was held that a vendee of the entire stock of goods in a store need not remove the goods in order to take possession of them, a change of control otherwise appearing from the facts showing the purchaser openly in charge as the business was continued in the same place.

In McKibbin v. Martin, 64 Pa. 352 (1870) a sale of the lease and furniture of a hotel was upheld, despite the local rule of constructive fraud which is applied in Pennsylvania, on the theory that there had been a change of possession. It appeared that the name of the hotel remained unchanged, and that the seller remained in the hotel as superintendent, but there was actual change of control by the buyer's taking charge of affairs, and such change of control was notified to the world in advertisements, in new names on letterheads, and in new names on bills rendered, receipts given, and checks drawn.

In Bucker v. Spicer, 269 Pa. 451, 112 Atl. 540 (1921) a certain stock of automobile parts was sold by a corporation to the plaintiff, one of its officers. The parts were moved to a warehouse leased to the president of the corporation, the key to which was retained by the plaintiff. The president of the corporation sold some of these parts from time to time, always before delivery getting the plaintiff's written order. The jury's finding that there was a change of possession was upheld.

Notice to a bailee in possession of the property sold, the bailee becoming keeper for the buyer, is equivalent to a change of possession. Pierce v. Chipman, 8 Vt. 334 (1836); Vance v. Bell, 153 Ark. 229, 240 S. W. 8 (1922). The last mentioned case applies the same rule to facts showing the seller's employee in charge of goods at a distant point continuing in charge thereafter as the buyer's employee. In Shipler v. New Castle Paper Products Corp., 293 Pa. 412, 143 Atl. 182 (1928) it was held that placing the sold stock of paper in a separate wareroom to which the seller retained the key was not

II. RETENTION OF POSSESSION, AND POWER TO SELL TO INNOCENT PURCHASERS.

1. Seller in Possession May Resell.

The seller of goods often retains possession temporarily after the sale is made, either in the exercise of his seller's lien awaiting payment of the purchase price, or for reasons of business convenience to either party. If the seller in possession thereafter sells to another party who is a purchaser for value without notice of the previous sale, and makes delivery to him, the second purchaser becomes the owner of the goods. In other words, the seller of goods, while he retains possession, continues by operation of law to have a limited power to sell those goods which can be effectively exercised by a subsequent sale followed by delivery to the second purchaser. The purchaser who buys from a seller in possession without getting delivery

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sufficient as change of possession. Says Sadler, J. at p. 185, "In passing upon the sufficiency of the transfer, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business." On whether delivery of a key is sufficient to satisfy the requirement of delivery of possession see annotation in 56 A. L. R. 518. In Foss v. Towne, 98 Vt. 321, 127 Atl. 294 (1925) the seller sold an automobile to the buyer who paid the price. The parties were associated in business, and also went on a vacation trip together, using the car, and the seller driving from time to time. In the business the car was used interchangeably by both, but the buyer drove the car home to his own place at night. One day while the car was in the seller's immediate control, it was levied on by one of the seller's creditors, and was sold by him at execution. The buyer sued the creditor for conversion, but recovery was denied, the Vermont rule being that retention of possession was conclusive of fraud against creditors. On the point of what was necessary for a change of possession, Taylor, J. stated as follows: . . . "A test sometimes applied is whether a careful observer would or would not be at a loss to determine from the appearances who owns and has control of the property . . . Finally, it is essential that the facts relied upon as showing possession in the vendee should be unequivocal. When the control and use of the property by the vendor and vendee are so confused and mixed as to leave the question of possession uncertain, the sale cannot be sustained against an attaching creditor."

thus acquires the property interest in the goods subject to defeasance by the exercise of the seller's residuary power of sale. When the seller exercises that power of sale which continues in him while he remains in possession he thereby deprives the original buyer of his property interest in the goods and vests it in the second purchaser.[17]

2. Consequences of the Exercise of the Seller's Power.

While the authorities on the point were formerly somewhat obscure[18] this position was greatly clarified by the language of the Uniform Sales Act.[19] Its general prevalence may be readily seen from the following applications. The first purchaser, who did not get delivery, cannot re-

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[17]To avoid any suggestion that the analysis presented in the text involves legal novelty it may be mentioned that powers of sale abound in legal relations. The lienholder, the pledgee, the mortgagee, all have powers of sale to enable them to realize on the security given. There are familiar powers of appointment in connection with wills. An illustration somewhat closely analogous to the problem discussed in the text is the power of the grantor in the case of unrecorded deeds of real estate, under the recording acts, to convey the land by a second deed which, if first recorded, vests the title in the second purchaser.

[18]The obscurity of the common law authorities before the Uniform Sales Act may be conveniently illustrated by contrasting the positions taken in two leading cases. Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119 (1821) it was asserted that delivery of possession is necessary in a conveyance of chattels as against everyone but the vendor. In Meade v. Smith, 16 Conn. 346 (1844), it was asserted that want of delivery to the vendee is in no case considered in any other light than as creating a presumption of fraud, conclusive when unexplained, and never as a circumstance which renders the sale merely inchoate, either as to the vendor or a subsequent purchaser or creditor.

[19]The Uniform Sales Act, sec. 25, reads as follows: "(Sale by Seller in Possession of Goods Already Sold). Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

plevy the goods themselves from the second purchaser to whom they were delivered.[20] Neither can he recover their value from the second purchaser in an action of conversion.[21] If, however, there has been delivery to neither purchaser, the goods being, for instance, now in the possession of some outside party as bailee, the first purchaser prevails against the second in the contest over who is entitled to the goods.[22] So obviously, if after the second sale by the seller still in possession delivery is made to the first purchaser, the second purchaser cannot replevy the goods from the first purchaser.[23] So, too, where the second purchaser receives delivery but has knowledge of the earlier sale, the first purchaser is entitled to the goods,

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[20]Williams v. Lancaster, 119 Me. 461, 111 Atl. 754 (1920) (hay); Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761 (1902) (horse); Hier v. Wightman, 188 N. Y. S. 274 (1921) (automobile); McKee v. Ward, 289 Pa. St. 414, 137 Atl. 599 (1927) (automobile); New England Auto Inv. Co. v. St. Germaine, 45 R. I. 225, 121 Atl. 398 (1923) (automobiles "sold" to first buyer as security for advances to automobile dealer, but left in dealer's possession).

[21]Cummings v. Gilman, 90 Me. 524, 38 Atl. 538 (1897) (apples); Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119 (1821) (tea—attaching creditors being treated as purchasers in the case); Hallett & Davis Piano Co. v. Starr Piano Co., 85 Ohio St. 196, 97 N. E. 377 (1911) (piano); Flynn v. Garford Motor Truck Co., 149 Wash. 264, 270 Pac. 806 (1928) (automobile); In Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N. E. 904 (1928) the second purchaser, in conformity with this analysis of the legal relations, sought and was granted an injunction against action by the first purchaser for conversion. If the goods were in the first instance delivered but were in a later independent transaction returned by the original buyer to the original seller, the rule stated in the text of course does not apply. Lynn Morris Plan Co. v. Gordon, 251 Mass. 323, 146 N. E. 685 (1925) (encumbered automobile).

[22]C. I. T. Corp. v. First Nat'l. Bk. of Winslow, 33 Ariz. 483, 266 Pac. 6 (1928) (automobiles still in possession of original seller); Superior Box Co. v. Jakimaki & Johnson, 146 Minn. 109, 177 N. W. 1021 (1920) (lumber in possession of a third person); Acme Wood Carpet Flooring Co. v. Braddock, 203 N. Y. S. 554 (1924) (lumber appropriated to first buyer's contract, then consigned to second buyer, can be replevied by the first buyer while still in carrier's possession).

[23]Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511 (1912) (office furniture).

and can hold the second purchaser liable for conversion where he adversely disposes of them to other parties.[24]

3. Reasons for Recognizing this Power in the Seller.

Judicial expression of the reasons for the well settled rule that the seller who retains possession still has a power to sell have often been formalistic and obscure, as well as somewhat divergent.[25] One of the most specific explanations given in the reported decisions is found in a leading Minnesota case[26] as follows: "* * * * men commonly act in their daily affairs upon the presumption that goods remaining in the hands of the former owner, with nothing to indicate that the relations of the parties are changed, gives a false and deceptive credit, and puts it in his power to sell them again to an innocent purchaser. This permits

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[24]McCune v. Hobbs, 16 Oh. App. 346 (1922) (automobiles—the second buyer having knowledge of the earlier sale).

In Gehl Bros. Mfg. Co. v. Hammond-Olsen Lumber Co. 184 Wis. 221, 199 N. W. 147 (1924) the first conveyance took the form of a chattel mortgage agreement which was duly recorded. It was held that the second purchaser was liable for conversion, having constructive notice of the earlier chattel mortgage.

[25]". . . the property was not absolutely and entirely transferred from Waln to the plaintiff. It might be so, as between themselves; but not with regard to a subsequent **bona fide** purchaser, for a valuable consideration." Jackson, J. in Lanfear v. Sumner, 17 Mass. 110 (1821) at pp. 114-115.

"As between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, . . . To render the sale valid against these (**bona fide** purchasers, and attaching creditors without notice) there must be delivery of the property." Foster, J. in Cummings v. Gilman, 90 Me. 524, 38 Atl. 538, at pp. 538-539.

"This is a rule of policy of our law, and inflexibly maintained." Wheeler, J. in Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511 (1912) at p. 513.

". . . the respondent (first buyer) took less precaution, and by his conduct placed Ludolph (original seller) in a position to defraud appellant (second buyer), and is therefore responsible for his actions." Beals, J. in Flynn v. Garford Motor Truck Co., 149 Wash. 264, 270 Pac. 806 (1928) at p. 810.

[26]Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761 (1902), at p. 762.

innocent purchasers to be misled by apparent ownership of goods where real ownership does not exist through an undisclosed transfer to another. Hence public policy requires that while goods remain in the possession of the former owner with the consent of the purchaser they should, as to innocent third parties, be treated as his property."

4. The Corresponding Power in the Seller's Creditors.

In some jurisdictions it was held before the Uniform Sales Act that retention of possession by the seller, even in the absence of fraud, not only gave rise to a power to sell in the original seller, but also gave rise to a power in the seller's creditors to subject the goods to the payment of their claims.[27] In such jurisdictions creditors could by appropriate process seize the goods regardless of the sale, just as they admittedly might where the sale was in fraud of creditors. This similarity of effect observable in such jurisdictions in the two types of cases naturally gave rise to the vague and obscure generalization in explanation that "delivery of possession is necessary in a conveyance of personal chattels as against everyone but the vendor."[28] It seems a much clearer statement of the relations actually involved in such cases to express the matter in the form that the property passes by agreement as in other cases but subject, if the seller retains possession, both to a power to sell in the seller himself and to a power to seize in the seller's creditors.[29]

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[27]Massachusetts has furnished the leading cases for this position. See Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119 (1821) (tea); Dempsey v. Gardner, 127 Mass. 381, (1879) (horse); Hallgarten v. Oldham, 135 Mass. 1 (1883) (tin); Carroll v. Haskins, 212 Mass. 593, 99 N. E. 477 (1912) (dictum).

[28]Jackson, J. in Lanfear v. Sumner, 17 Mass. 110 (1821).

[29]It would seem that this position has been changed with respect to creditors. Under sections 18 and 19, delivery is not necessary to pass the property interest in goods. If the seller retains possession he has the power, under sec. 25, to sell the goods over again. Creditors may impeach the sale, under sec. 26, only where the retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law.

III. BAILEES AND FACTORS—APPARENT OWNERSHIP OR AUTHORITY— FACTORS' ACTS.

1. Factors are Bailees For Sale—Other Bailees.

Distribution of goods from producer to consumer does not always take the form of a sale by one party to another in the chain of transfers. Various reasons of business convenience may induce the parties at various points in the process to resort to alternative devices. One of these alternative devices frequently encountered is the bailment for sale, sometimes described as a consignment, or consignment for sale. In such cases possession of the goods is delivered to the bailee, who for a commission acts for the bailor in selling and delivering the goods to customers. The parties who thus become bailees for sale are often dealers who also buy and sell on their own account. In legal discussions they are often called factors while in the language of commerce they are often described as commission men or commission merchants.[30] Again, it may happen that the bailee is entrusted with possession but is given no authority to sell, his authority being merely to secure offers for the bailor's consideration.[31] Still another alternative device in carrying out the process of distribution of goods from producer to consumer is the bailment for use, sometimes described as renting out, or leasing and hiring.[32]

For elaborate examination of the authorities in each state on fraudulent conveyances and retention of possession, see Williston on Sales, chapter XV.

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[30]Mechem on Agency, sec. 2497.

If the possessor sells as authorized the purchaser is of course protected even though the possessor who sold failed properly to account for the proceeds. Crosley v. Paine, 170 Minn. 43, 211 N. W. 947 (1927) (bonds).

For a comprehensive treatment of the law applicable to factors in their relations both with their principals and with third parties see Mechem on Agency, secs. 2496-2598.

[31]Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882) (diamond ring).

[32]See for details, that topic in any standard encyclopedia of law, or treatise on Sales or on Bailments.

These various alternative devices have the element in common that possession of the goods is entrusted to a bailee who has under the arrangement with the bailor a limited authority to deal with the goods in accordance with the terms agreed upon.

2. Bailee's or Factor's Misconduct.

Bailees in possession of the goods of another may mistakenly or fraudulently dispose of the goods in violation of the terms of the bailment. In resulting controversies between the bailor and third parties may be acutely involved the legal question as to what extent the bailor's property interest in the goods can be affected by the defaulting bailee's dealings in disposing of the goods to other parties. Expressed in terms of juristic perspective this is a question of to what extent the risks of the bailee's default ought to rest on the bailor who selects the bailee rather than on the third party who deals with him. In seeking the applicable answer to that question for a particular case in hand it is necessary to recognize certain independent considerations of policy apart from the terms of the bargain as well as to distinguish certain general types of common fact situations.

3. General Rule—Caveat Emptor.

The elementary rule of property law is well settled that in the absence of special considerations no one can transfer a property interest which he does not have.[33] Even a purchaser in good faith for value without notice can in ordinary cases acquire no more than his transferor had.[34] This position rests on the broad underlying con-

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[33]Consolidated National Bank of Tucson v. Giroux, 18 Ariz. 253, 158 Pac. 451 (1916) (cattle); Sterling Tire Corporation v. Beers, 100 Conn. 45, 122 Atl. 656 (1923) (automobile tires); Coolidge v. Old Colony Trust Co., 259 Mass. 515, 156 N. E. 701 (1927).

[34]Wilkinson v. King, 2 Camp. 335 (1809) (bailee for storage of lead); The Idaho, 93 U. S. 575, 23 L. ed. 978 (1876) (cotton); Kastner v. Andrews, 49 N. D. 1059, 194 N. W. 824 (1923) (grain elevator storing wheat); Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541 (1838) (carrier by water transporting lead); Barnett v. London Assur. Corporation, 138 Wash. 673, 245 Pac. 3 (1926) (automobile—dictum).

sideration that the social interest in security of property generally requires that one who obtains property from another should succeed merely to what his transferor had. *Caveat emptor*, "let the buyer beware," has therefore generally held its ground in the application of property law, throwing on the transferee the risk of lack of ownership in the transferor. Security of property for the original owner has as a general rule been accounted of greater importance to the general welfare than the possible resulting freedom of commerce that might be achieved by protecting the transferee who acquires the goods from a transferor who cannot rightfully convey. Accordingly, in ordinary cases a purported sale by a thief or converter, even though he is in possession of the goods, does not transfer the property in the goods to the buyer.[35] *Caveat emptor.*

4. Exceptions Based on Estoppel.

Facts bringing a particular case within the rules of estoppel may preclude the application of the rule *caveat emptor.* Thus, where the owner of goods by words or acts makes a representation to a third party that another is the owner or has authority to sell the goods and such party buys the goods in reliance on that representation, the original owner is not thereafter in contest with such party permitted to deny its truth. The original owner thus being unable to reclaim the goods from such purchaser it may be stated that the property interest in them has passed to their new owner by operation of the rules of estoppel.[36] A similar application of estoppel is found where a party who

[35]Nickel v. Fox, 262 Mass. 170, 159 N. E. 541 (1928) (wearing apparel stolen from cargo of stranded vessel); Lewis v. Kanters, 262 Mass. 275, 159 N. E. 617 (1928) (automobile); Amols v. Bernstein, 212 N. Y. S. 518 (1925) (diamond ring); Hessen v. Iowa Automobile Mut. Ins. Co., 195 Ia. 141, 190 N. W. 150 (1922) (automobile); Barnett v. London Assur. Corporation, 138 Wash. 673, 245 Pac. 3 (1926) (automobile—dictum); Baumgarten v. Farwell Sales Co., 180 Wis. 301, 192 N. W. 1006 (1923) (automobile).

[36]Williston on Sales, sec. 312. The problem of distinguishing between estoppel and apparent authority is discussed, with citation of authority, in Mechem on Agency, secs. 720-726.

does not yet own the goods he purports to sell thereafter acquires them.[37] Fairness between the parties is deemed to require that the party who makes the representation in reliance on which the other party acts in such a way that he cannot without damage withdraw from the transaction should not thereafter in contests with the other be permitted to deny the truth of his own representation.[38]

5. Exceptions Based on Broader Considerations of Policy.

Some exceptions to the general rule of *caveat emptor*, resting on independent special consideration of policy are also well recognized.

a. Market Overt.

Thus it is well settled in the English law that the buyer of goods under circumstances where the rule of *market overt* applies becomes the owner of the goods even though they had been stolen from the original owner.[39] Security of property for the original owner under the circumstances has been required to give way in favor of freedom of commerce and security of transactions for the transferee. *Caveat emptor* has for the instance been replaced by *caveat dominus*. The burden in the instance is placed upon the original owner to see to it at his peril that his goods are not permitted to be exposed for sale in places to which the rule of *market overt* applies.

b. Currency.

While the rule of *market overt* has not been accepted in this country,[40] the American law recognizes a somewhat

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[37]The Idaho, 93 U. S. 575, 23 L. ed. 978 (1876) (cotton). Shaw, C. J. in Rowley v. Bieglow, 12 Pickering (Mass.) 307 (1832) at p. 315.

[38]Williston on Sales, sec. 312; Ewart on Estoppel, especially chapter XI.

[39]Sale of Goods Act, sec. 22 (1). See observations in Clayton v. LeRoy, (1911) 2 K. B. 1031. Pease, The Change of the Property in Goods by Sale in Market Overt, 8 Columbia Law Review, 375.

[40]Wheelwright v. Depeyster, 1 Johns (N. Y.) 471 (1806). To the same effect, see remarks of Thompson, J., in Ventress v. Smith, 10 Pet. (U. S.) 161 (1836), at p. 176, 9 L. ed. 382, at p. 387.

similar rule in the case of currency. It is well settled that the transferee of money in the form of coin or other currency in the ordinary course of business becomes the owner thereof whether or not it had in the instance been stolen from an earlier owner.[41] Security of transactions in the settlement of which money has passed is recognized as being too important to permit of such transactions being ripped up again in favor of security of property for the original owner of the stolen money. For reasons of policy, therefore, here, too, *Caveat emptor* has been replaced by *Caveat dominus.*

c. Negotiable Instruments.

Another illustration of the same sort may readily be drawn from the law of negotiable instruments. It is well settled that if such instruments are payable to bearer or are so indorsed as to render them transferable by mere delivery the transferee who takes as a holder in due course becomes entitled to the instrument and can enforce it against the prior parties to it irrespective of how it was acquired by his transferor or earlier parties.[42] The overwhelming importance to the general welfare not only of security of transactions in which such instruments are passed but also of making possible and preserving the large range of productive credit resting on the negotiability of such instruments is readily appreciated. Accordingly, the original holder of ordinary negotiable instruments which are in the requisite forms to be transferable by delivery is required at his peril to see to it that they do not get into

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[41]The historically leading English authority is Miller v. Race, 1 Burr 452 (1758). The American law on the point is the same. See Smith, Personal Property, p. 61, and authorities cited. A recent conspicuous case is Brown v. Perera, 176 N. Y. S. 215 (1918) wherein this principle was applied also to foreign money, foreign at the place of the theft but circulating there as a matter of business practice in connection with the foreign trade centering there.

[42]Goodman v. Simonds, 20 How. 343, 15 L. ed. 934 (1857). For a collection of authorities on the point under the Negotiable Instruments Law, see Brannan's Negotiable Instruments Law, 4th ed. (Chaffee's), p. 148-150.

the hands of unauthorized parties. As to such instruments *Caveat emptor* has for reasons of policy been replaced by *Caveat dominus.*

6. No Estoppel Based on Mere Delivery of Possession.

Where the bailee in possession disposes of the goods in violation of the terms of the bailment under which he derives his actual authority from the owner the rule of *caveat emptor* ordinarily applies.[43] No estoppel to vary this result for the protection of the transferee can be made out from the mere fact that the original owner has intrusted the possession of the goods to the bailee. Not only is it eminently proper to entrust possession of goods to another as in cases of agency, loans, leasing, or consignments for sale, but the ordinary details of modern business operations could not otherwise be carried on. The practice of doing so is well known. Accordingly, the mere fact of entrusting possession of the goods to another does not constitute a representation that the possessor either is owner or has authority to sell.[44] Delivery of possession is

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[43]A sale by a factor of goods on consignment is unauthorized, not being in the ordinary course of business, where the factor sells the entire stock in bulk as a part of the transfer of his business. Accordingly the factor's principal may replevy the goods from the factor's purchaser. Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601 (1900). Where the factor transfers the goods to a third party in satisfaction of his own debt the sale is not in the ordinary course of business of a factor, is not authorized by the principal, and does not pass the principal's property. Accordingly the principal can recover the goods from the factor's transferee. Warner v. Martin, 11 How. 209, 13 L. ed. 667 (1850). See also authorities cited in note 44 below.

[44]Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601 (1900) (groceries); American Process Co., v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908) (equipment—dictum); Drain v. LaGrange State Bank, 303 Ill. 330, 135 N. E. 780 (1922) (automobile); Collins v. Ralli, 20 Hun. 246 (1880) (cotton); Canales v. Earl, 168 N. Y. S. 726 (1918) (automobile); Dillard & Coffin Co. v. Beley Cotton Co., Inc., 150 Tenn. 195, 263 S. W. 87 (1924) (cotton); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S. W. 125 (1924) (cotton); Robertson v. C. O. D. Garage Co., 45 Nev. 160, 199 Pac. 356 (1921)

well known to be equally consistent with a transfer and with a retention of the property interest in the goods. Even that the party to whom possession is delivered is in the business of selling such goods does not raise an estoppel against the original owner who thus delivers.[45] Doubtless that circumstance affords some evidence of actual authority to sell,[46] but any inference to that effect can be repelled by proof of a contrary nature.[47] Thus a watch may be delivered to the jeweler for repair, though the jeweler also is in the business of selling watches.[48] An automobile may be delivered to a garageman for servicing or repairs though the garageman also in in the business of selling second-hand automobiles.[49] Similarly, goods may be delivered to a dealer in such goods to exhibit and secure offers from prospective buyers for the owner's consideration without thereby empowering the possessor to sell the goods without the original owner's consent.[50]

(automobile); William Birns v. Fritz, 199 N. Y. S. 540 (1923) (furniture); Scherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925) (store counter).

[45]Wilkinson v. King, 2 Camp. 335 (1809) (lead); Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882) (diamond ring). "This fact alone does not obviate the rule of caveat emptor, nor does it import the doctrines peculiar to markets overt. The purchaser likewise knows the character of the business carried on by the warehouseman and knows that in the ordinary conduct of such business he will both purchase grain and receive it in storage. This carries notice that his right to sell is limited to the excess above what is required to meet the outstanding storage receipts." Birdzell, J. in Kastner v. Andrews, 49 N. D. 1059, 194 N. W. 824 (1923) at p. 829.

[46]Williston on Sales, sec. 314. The actual decision in Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922), referred to in footnote 54 below, would seem to be amply accounted for on this basis, though the court goes further in the language of its opinion.

[47]Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882) (diamond ring); Biggs v. Evans, (1894) 1 Q. B. 88 (opal matrix table top entrusted to jeweler); Kastner v. Andrews, 49 N. D. 1059, 194 N. W. 824 (1923) (grain stored in elevator).

[48]Williston on Sales, sec. 314.

[49]Mariash on Sales, sec. 183.

[50]Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882) (diamond ring); Smith v. Clews, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392 (1889) (diamond ring).

7. Apparent Ownership or Apparent Authority.

Certain additional facts, however, whether classified as involving estoppel or as involving broader independent reasons of policy, or both, have been recognized as sufficient in the instance to require protection of the transferee. Such facts are often loosely grouped together under the broad designations of apparent ownership or apparent authority. Conspicuous among these are the instances where the owner of the goods so arranges the paper evidences of ownership or authority as to make it appear that the property interest or the authority to sell is in the possessor. Thus in the leading case of *Pickering v. Busk*,[51] where a hemp merchant allowed a broker who had purchased hemp for him to transfer the hemp on the books of the warehouse, where it was stored, to the broker's name, it was held that the broker's subsequent sale was operative to pass the property to his purchaser. Again, where the buyer acquiesced in an arrangement whereby a bill of sale of goods was made out from the original seller to the buyer's agent who was left in possession, and the agent thereafter without permission sold the goods to a third party to whom he exhibited the bill of sale, it was held that the property passed to the new purchaser.[52]

The property may be held to have passed to a purchaser from the possessor, by virtue of the doctrines of apparent ownership or authority, however, even though paper evidences of ownership are lacking or are not themselves deceptive. Where the owner of an automobile, or an interest therein, not only entrusts its possession to a retail

[51]15 East, 38 (1812).

It may be observed that the actual result in the case can be upheld also on the ground of actual authority, thus evidenced, in the absence of proof of contrary intention.

[52]Nixon v. Brown, 57 N. H. 34 (1876) (horse). In Calais Steamboat Co. v. Van Pelt's Admr., 2 Black, 372, 17 L. ed. 282 (1862) it was held that a purchaser from the agent was protected even though the sale was in violation of instructions where plaintiff ordered a steamboat built under the supervision of an agent and gave the agent directions to hold himself out as owner, and to have the vessel enrolled in the agent's name, which was done.

dealer in such vehicles but permits the dealer to put it in his showroom where ordinarily such vehicles are displayed exclusively for sale, a sale by such dealer in the ordinary course of business, even though in violation of his instructions, is held to pass the property to the purchaser.[53] A few additional illustrations on somewhat varying facts are given in the footnote.[54] Where the unauthorized sale is not made in the ordinary course of business, however, the purchaser is not protected, the appearance of authority to sell in the ordinary course of business not justifying reliance thereon where sales are made out of the usual course.[55]

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[53]Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922) (second hand automobile delivered to a used car dealer); Commercial Acceptance Trust v. Bailey, 87 Cal. App. 117, 261 Pac. 743 (1927); Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876, 25 A. L. R. 312 (1921); Commonwealth Finance Corp. v. Schutt, 97 N. J. L. 225, 116 Atl. 722 (1922); Clark v. Flynn, 120 Misc. 474, 199 N. Y. S. 583 (1923); Jones v. Commercial Investment Trust, 64 Utah 151, 228 Pac. 896 (1924).

[54]In Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922) plaintiff left his automobile with a garageman whose business was selling second hand cars, both his own and others left with him for sale. The testimony seems to the present writer strongly to suggest actual authority to sell. A sale was made, claimed to have been unauthorized, the garageman having been anthorized merely to secure offers. The court held that the plaintiff could not recover from the purchaser, taking the position that even if no actual authorization had been given to sell, the case fell within the range of apparent authority, the premises being surrounded by conspicuous signs advertising that the business carried on there was that of selling cars, and plaintiff knowing that fact when he left the car there. In O'Connor v. Clark, 170 Pa. 318, 32 Atl., 1029, 29 L. R. A. 607 (1895) the owner of a wagon rented it out to a piano mover whose name he permitted to be painted on the wagon to help advertise the business. It was held the original owner could not recover the wagon from a third party to whom it had been sold by the piano-mover. In Island Trading Co. v. Berg Bros. 239 N. Y. 229, 146 N. E. 345 (1924) the original seller's permitting another to use the postal receipts given when the goods were shipped by parcel post in order to get the purchase money from a subpurchaser was held to preclude the original seller from reclaiming the goods from the subpurchaser.

[55]C. I. T. Corp. v. Winslow First Nat'l Bk., 33 Ariz. 483, 266 Pac. 6 (1928) (entire retail stock of automobiles sold to bank for ante-

The exact limits of apparent ownership and apparent authority as legal doctrines are somewhat unsettled, and how far they ought to be carried is problematical. Their proper marking out in application to current business affairs requires intimate familiarity with the practical details as well as intelligent grasp of their legal perspective. It seems clear that these doctrines go beyond the ordinary rules of estoppel if the term estoppel is confined to cases of holding out by one to another and change of position in reliance thereon. They depend for their justification, at least in part, upon broader considerations of policy, being in this respect somewhat remotely analogous to the rules of the law merchant regarding negotiability.[56] In part, at least, they exemplify concessions to felt needs for more largely sustaining security of transactions for the advantage of trade and commerce, haltingly and gropingly made at the expense of security of property to the original owner. To some degree at least they thus represent a fresh example of gropingly replacing *caveat emptor* by *caveat dominus*.

8. Factors' Acts.

Factors often make advances to their principals on account of the goods, which in the ordinary course are repaid by the factor's retaining for himself the necessary amount out of the proceeds of resales.[57] Where the factor thus makes advances to his principal on account of the goods delivered he is entitled to a "factor's lien" on the

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cedent debt, the retailer being in failing condition); Andre v. Murray, 179 Ind. 576, 101 N. E. 81, L. R. A. 1917 B, 667 (1913) (sale of entire stock in bulk—dictum); Burbank v. Crooker, 7 Gray (Mass.) 158, 66 Am. Dec. 470 (1856) (sale of entire stock in bulk).

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[56]See footnotes 41 and 42 above, with accompanying text.

[57]In Shoyer v. Wright-Ginsberg Co., 240 N. Y. 223, 148 N. E. 328 (1925) for instance, the factor's contract called for advances to the principal of 85% of the purchase price, the factor thus in substance financing the transaction.

goods,[58] and may repledge the goods to others to the extent of his advances.[59]

Where without authority factors pledge goods of their principals as security for advances to themselves beyond the amount of their own advances to their principals the common law rules afford no protection to the pledgee against the original owner of the goods. The transaction being out of the usual course of the business of selling cannot be upheld by invoking the rules of apparent authority, while estopped cannot be rested on the mere circumstance of the factor's possession. The factor's authority to sell accordingly does not involve as an incident the legal power to make a valid pledge of his principal's goods.[60]

Factors' Acts in certain jurisdictions have by legislative authority empowered factors to make valid pledges in cases falling within the terms of such statutes.[61]

The general effect of such statutes, where enacted, thus is to that extent to put the risk of the factor's default on the principal who selects him instead of on the purchaser who deals with him. In entrusting his goods to the factor's possession with authority to sell the owner is required to assume the burden of the factor's unfaithfulness. For the advantage of trade and commerce such statutes, so far as they go, thus promote security of transactions for subsequent parties at the expense of security of property for the original owner. So far as they go, therefore, such factors' acts replace *caveat emptor* with *caveat dominus*. Con-

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[58]Mechem on Agency, secs. 2559-2567, and authorities cited.

[59]Mechem on Agency, sec. 2510 and authorities cited. Authorities for and against this position, with some discussion of the difficulties of their application are classified in 14 A. L. R. at pp. 427-430.

[60]The leading case is Paterson v. Tash, 2 Strange 1178 (1743). Numerous authorities to the same effect are compiled in Mechem on Agency, sec. 2509, and in 14 A. L. R. 424-427.

[61]For a compilation of authorities under such statutes, see 14 A. L. R. 431-449. An extended discussion of the background of English Factor's Acts, with examination of the judicial materials thereunder is given in Williston on Sales, secs. 318-319. The American legal materials are summarized in Williston on Sales, secs. 320-323.

struction of such statutes in doubtful cases has been strict[62] or liberal[63] in various courts, depending essentially on whether the court in question has regarded security of property for the original owner or security of transaction for subsequent parties for the advantage of trade and commerce as in the given setting most vital to the general welfare.[64]

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[62]H. A. Prentice Co. v. Page, 164 Mass. 276, 41 N. E. 279 (1895) (Factor's Act held not applicable to case where goods were entrusted to the factor by the principal, induced by the factor's fraud). Warner v. Martin, 11 How. 209, 13 L. ed. 667 (1850) (N. Y. Factor's Act held not applicable to a sale for an antecedent debt).

[63]Freudenheim v. Gutter, 201 N. Y. 94, 94 N. E. 640 (1911) (Factor's Act held applicable to pawn of diamond entrusted to a traveling salesman to sell). Thompson v. Goldstone, 171 App. Div. 666, 157 N. Y. S. 621 (1916) (Factor's Act held to apply to the case though the factor secured possession of the goods from the principal by fraud). Holders of the legal title under trust receipts as security for advances to the beneficial owner in possession are postponed to the beneficial owner's pledgee of the goods under the operation of the Factor's Act, if the trust receipt terms authorizing sale are broad enough to bring the case within the statute. Blydenstein v. N. Y. Security & Trust Co., 67 Fed. 469 (1895); International Trust Co. v. Webster Nat'l Bk. 258 Mass. 17, 154 N. E. 330, 49 A. L. R. 267 (1926) (wool); N. Y. Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. 595 (1899) (burlap).

[64]"As to such (Factors') acts, we may expect the same course of decision that we found with bills of lading; narrow for a while, construing the act to give the factor as little power as possible, to honor of the ancient common law; broader, as time goes on and the 'mercantile theory' becomes more familiar and less terrifying. —The lines of narrow construction were chiefly two: (1) cut down the application of the act to **persons**: this man is not a 'factor' within the meaning of the act, as to these goods; (2) cut it down as to transactions: this kind of 'purchase' is not within the act, or was not 'without notice' within the act, or was not 'for value' within the act." Llewellyn, Cases and Materials on Sales, p. 904.